IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8989 OF 2003

Uttam Ramchandra Ugale..... ..... Petitioner.

Versus

Smt.Leelabai Kalu Shinde & Ors..... Respondents.

Mr. M. M. Sathaye for the Petitioner.

Ms. Manda Loke i/by Mr. S. S. Kulkarni
for the Respondents.

CORAM : S. A. BOBDE, J.

DATED : 5TH MAY, 2005.

P.C.:

Rule.

2. Learned Counsel appearing for the Respondents waives service of Rule. Rule made returnable forthwith and heard by consent.

3. The Petitioner has challenged the order of the appellate court by which the appellate court has confirmed the order of the trial court and thereby refused to set aside the exparte decree passed against the Petitioner. The Petitioner was Defendant No.2 in

Regular Civil Suit No.733 of 1993. He applied for setting aside the exparte decree on the following grounds:

(i) That his advocate Miss. Puranik did not take timely steps to file written statement.

(ii) That advocate assured to intimate the applicant, the progress of the suit.

(iii) Advocate Miss. Puranik left practice after marriage when suit was pending.

(iv) That at no point of time advocate intimated him the progress in the suit.

(v) He came to know about ex-parte decree, on 28.1.1998 when Decree-Holder applied for supply of water and electricity of the suit property.

4. More importantly he applied for setting aside the exparte decree alleging fraud on the part of the Respondents. According to the Petitioner, the

Respondents have misled the court by originally seeking a decree only in respect of Plot No.78 in the plaint filed on 21st July, 1993. Since the Petitioner had no concern with Plot No.78 he ignored the Plaint. According to the Petitioner, after the court passed an order that the suit should proceed without the written statement on 17th April, 1994 the Respondents applied for further amendment of the plaint and substituted Plot No.78 to Plot No.54. Plot No.54 which belongs to the Petitioner thus became the matter of dispute behind his back. It appears that the Petitioner's advocate did not inform the Petitioner regarding this change.

5. The Courts below appear to have dismissed the Petitioner's application under Order IX rule 13 of the Code of Civil Procedure since according to them sufficient cause is not shown by the Petitioner. They have, however, not dealt with the specific allegation of misleading the Court made by the Petitioner. The trial court has referred to the Petitioner's contention in its order. The appellate court has not even referred to this contention. The appellate court has disbelieved the Petitioner's case on the ground that the petitioner is a court clerk and therefore he

must have known about the exparte decree. In my view, there was no reason to make such an assumption. It is a settled law vide **Rafiq and anr. v/s Munshilal and anr.**, reported in AIR 1981 SC 1400, that the mistake of an advocate should not be allowed to cause prejudice to the litigants. The Petitioner has categorically pleaded that the Advocate who was conducting the suit filed by him against the Respondents had withdrawn her appearance sometime in October, 1997. He received papers of that suit from that advocate in January, 1998 and while going through the Respondents' written statement in his suit, he came to know that the exparte decree had been passed against him in the suit filed by the Respondents. Earlier, as stated above, he had ignored the suit filed by the Respondents since it was regarding Plot No.78 with which he had no concern. In the circumstances of the case, I find that an important aspect has not been dealt with at all by the courts below, namely, the reason why the Petitioner allowed the suit to proceed without written statement which eventually resulted in passing an exparte decree against him. This has clearly resulted in miscarriage of justice. In the circumstances, I am inclined to allow the petition and make Rule absolute in terms of

prayer clause (b) subject to the Petitioner paying costs in the sum of Rs.2,500/- to the Respondents within a period of 45 days from today.

6. Accordingly, Rule made absolute in terms of prayer clause (b) of the petition subject to payment of costs of Rs.2,500/- by the Petitioner to the Respondents within 45 (forty five) days from today. Prayer clause (b) reads thus:

> (b) That on perusal of the same and on further hearing from the Petitioner, this Honourable Court be pleased to quash and set aside the impugned Judgment and Order dated 19th June, 2003 passed in Civil Misc. Appeal No.188/2000 by the 3rd Addl. District Judge, Nashik, thereby allowing the said appeal thereby setting aside the exparte Judgment and Decree dated 19/12/1994 passed in Regular Civil Suit No.733 of 1993 by the 2nd Joint Civil Judge, Junior Division, Nashik and restoring the said suit on the file of an appropriate Court.

7. Writ Petition is disposed of, accordingly.

Sd/-

(**S. A. BOBDE, J.**)